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In the
Supreme Court of the United States
October Term, 1945

No. 888

BLANCHE STANFIELD,
Executrix of the Last Will and Testament of
Lloyd B. Stanfield, Deceased,

Petitioner,

VERSUS

THE PAUL REVERE LIFE INSURANCE COMPANY,
Worcester, Massachusetts, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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Pursuant to the permission granted by Paragraph 3 of Rule 38 of the rules of this Court, the respondent, The Paul Revere Life Insurance Company, files this brief in opposition to the brief heretofore filed by the petitioner in support of her petition for writ of certiorari.

SUMMARY OF ARGUMENT

A. Respondent agrees that the ultimate question to be determined is correctly stated by the petitioner, but does not agree that in this cause the petition for the writ should be granted.

B. There is no conflict between the decision in *United Mutual Accident Association* v. *Barry*, 131 U.S. 100, 33 L. ed. 60, and the decision in the Circuit Court of Appeals herein.

C. Conflict between decisions of various Circuit Courts of Appeals is inevitable when such courts are determining matters of local law where decisions of the state courts are controlling under the doctrine announced in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188.

D. The Circuit Court of Appeals, Tenth Circuit, did not fail to follow the decisions of the Supreme Court of Oklahoma, there being admittedly no controlling case.

E. The Circuit Court of Appeals reached a just conclusion which is consonant with the weight of authority.

ARGUMENT

A.

The question in this case.

Respondent agrees with the statement contained in petitioner's brief at Page 9 as being the ultimate question to be determined in this litigation. The respondent states, however, that none of the suggested reasons outlined in Para-

graph 5(b) of Rule 38 of this Court impel the granting of the petition for the writ. The question involved is the construction of language used in an insurance contract, which is purely a question of local law.

B.

There is no conflict between the decision in United Mutual Accident Association v. Barry, 131 U.S. 100, 33 L. ed. 60, and the decision in the Circuit Court of Appeals herein.

The facts in the *Barry* case decided by this Court in 1889 are quite different from the facts in the case at bar in that, although it involved a sunstroke, the policy required only that there be external and visible signs of injury, while in the case herein the policy required that there be a visible wound or contusion on the exterior of the body of the deceased. The distinction between the two cases is made in the opinion of the Circuit Court herein (at Page 27 of the Transcript), when the Court said:

> "They arose under provisions which required a visible mark or evidence of injury, or language meaning substantially that. Under such a proviso we would have no difficulty in concluding that there were visible marks and evidence of an injury. But this proviso requires a wound or contusion on the exterior of the body."

The *Barry* case is cited and is likewise distinguished in *Travelers Insurance Company* v. *Ansley*, 22 Tenn. App. 456, 124 S.W.(2d) 37. The Court said at Page 42:

> "In other words under the one provision any manifestation of the injury which can be properly classified

as a sign or mark thereof is sufficient to meet its requirements, whereas, under the other, the parties agree upon the kind of sign or mark, namely, a bruise or contusion that must exist on the exterior of the body before liability is incurred.

"In this view every external wound or contusion may be a sign or mark of an internal injury not otherwise apparent to the eye but we think it clear that every physical sign or mark of such an injury is not necessarily a wound or contusion as those words are commonly understood."

It is probably immaterial whether the decision of the Circuit Court of Appeals in this case is in conflict with the *Barry* case, because in the interim between the decisions in these two cases, this Court has announced the doctrine embodied in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188. If, however, *Erie Railroad Company* v. *Tompkins* were not controlling, then the present decision in this case would be correct in any event, because of the opinion in *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U. S. 491, 54 Sup. Ct. 461, 78 L. ed. 934, which held that a sunstroke was not an accident.

C.

Conflict between decisions of various Circuit Courts of Appeals is inevitable when such courts are determining matters of local law where decisions of the state courts are controlling under the doctrine announced in Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188.

Respondent admits that the decision in this case is in conflict with the decision of *Wiecking* v. *Phoenix Mutual Life Ins.*

Co., 116 Fed.(2d) 90, and it is in conflict with the decision in *Huss* v. *Prudential Ins. Co. of America*, 37 Fed. Supp. 364. That conflict, however, is quite natural and must be expected so long as the Federal courts are required to follow decisions of the state courts on matters of local law, particularly when the opinions of state courts on the same question are by no means uniform. In the *Wiecking* case the Court specifically states that the only question before it was what was the Indiana law. In the *Huss* case, *supra*, the Court said in its opinion at Page 366:

> "Of course, in view of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188, 114 A.L.R. 1487, this is no longer a question of general commercial law, but must turn upon the Connecticut law."

There will be conflicts in the decisions by the same Circuit Court of Appeals when cases are appealed from district courts sitting in separate states where the decisions of the Supreme Courts of the two states differ on matters of local law. This Court has said in *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 82 L. ed. 1290:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to the permissible difference of opinion in the state courts."

D.

The Circuit Court of Appeals, Tenth Circuit, did not fail to follow the decisions of the Supreme Court of Oklahoma, there being admittedly no controlling case.

The Supreme Court of Oklahoma has not passed on a case involving an insurance policy with a provision com-

parable to that herein. This is admitted by petitioner in her brief at Page 14. It is true that in numerous cases the Supreme Court of Oklahoma has held that a sunstroke is an accidental death, but none of the policies involved in the cases cited in the petitioner's brief made the requirement that the accidental death be evidenced by a visible contusion or wound on the exterior of the body. The Circuit Court in its opinion, in the Transcript at Pages 25 and 26, states that a:

> "* * * sunstroke is an accident effected solely through external, violent and accidental means."

The Court then discusses the question of whether or not this particular type of accidental death is one that is covered by the policy. The opinion ends with the statement:

> "In the absence of any guidance from the Supreme Court of Oklahoma we choose to follow those decisions which hold manifestations such as outlined above insufficient to constitute a wound or contusion upon the exterior of the body."

Until the Supreme Court of Oklahoma decides a case involving the same or similar issue, we submit that it is idle to speculate upon what that Court would say. Counsel for petitioner think that under a similar set of facts, the Supreme Court of Oklahoma would decide in favor of the beneficiary. Counsel for the respondent disagree. It is submitted that where there is no controlling decision of a state court, the Federal court may render such judgment and may construe the provisions of an insurance policy as it may think just and proper. The petitioner seeks an extension of the doctrine

announced in *Erie Railroad Company* v. *Tompkins* to an extent that is unauthorized by any decision of which respondent's counsel have any knowledge. The petitioner would have the Federal court bound not only to follow prior decisions of the state court, but bound to follow speculation as to what the Supreme Court of Oklahoma would say if, as, and when the question is presented to it. It is submitted that none of the decisions of the Supreme Court of Oklahoma cited under Proposition D give any indication whatsoever of what the Supreme Court of Oklahoma would do under the facts in a similar case, because none of the cases cited refer to a policy of insurance which requires visible contusions or wounds on the exterior of the body.

At Page 16 of her brief, the petitioner takes the position that the language in the policy is ambiguous and uncertain. In *Fidelity Mutual Life Ins. Co.* v. *Powell,* 74 Fed.(2d) 525, there was involved an identical double indemnity rider. Judge Parker stated in his opinion that the language was as plain as any of which our English speech is capable. On Page 17, the petitioner says that the language used was only to guard against fraud and was not intended as an exclusion from the coverage of the policy. This position has been held untenable by the Tennessee Court of Appeals in *Travelers Insurance Company* v. *Ansley,* 124 S.W.(2d) 37; *Ansley* v. *Travelers Insurance Company,* 173 S.W.(2d) 702, and by the Fourth Circuit Court of Appeals in *Fidelity Mutual Life Ins. Co.* v. *Powell, supra.*

E.

The Circuit Court of Appeals reached a just conclusion which is consonant with the weight of authority.

If the Federal court on a matter of local law receives no guidance from the decisions of the applicable state court, respondent knows no rule which requires the Federal court to decide the matter in accordance with that hypothetical thing called "the weight of authority." In the present case the Tenth Circuit Court of Appeals said (Tr. 27):

> "The parties were free to make their own contract and it is our duty to give effect thereto. Where language is clear and unambiguous and has a well-defined meaning, the presumption must be that the parties used such words in their ordinary and well understood meaning. Courts are not justified in adopting strained or technical or unnatural definitions of words in order to swing the pendulum one way or the other."

Even the dissenting judge who voted to sustain "the trial court's prophecy of what course the Supreme Court of Oklahoma would follow," said:

> "I cannot agree to a reversal of the judgment simply because the authorities on the other side of the question appealed to me as more logical and just."

Assuming, however, that this Court is interested in the matter of weight of authority, respondent submits that the weight of authority sustains the judgment of the Circuit Court of Appeals herein. Of the cases listed at Pages 19 and 20 of the petitioner's brief, there are exactly two in point. These are the *Wiecking* case, *supra*, and the *Huss* case, *supra*. Both of these cases involve identical policies and involve death by

sunstroke, yet in neither of these cases was the Federal court free to follow its own opinion. Under *Erie Railroad Company* v. *Tompkins, supra,* they were required to follow, and in their opinions stated that they were following the state court decisions in Indiana and Connecticut, respectively. Each of the other cases cited by petitioner involves a death resulting from poisoning (or some cause other than sunstroke), or the language of the policy involved differed in a material respect from that herein.

It will be noted that at Page 20 petitioner has cited the case of *Gasperino* v. *Prudential Ins. Co.* (Mo.), 107 S.W.(2d) 819. In that case the court held:

> "Cracked lips of insured suffering from typhoid fever effected solely through violent, external, and accidental means, were a visible 'contusion' or 'wound' on the exterior of the body within requirement of double indemnity clause of life policy so as to warrant recovery thereon for death resulting from fever."

This opinion, however, was quashed by the Supreme Court of Missouri sitting *en banc* in the case of *State ex rel. Prudential Ins. Co.* v. *Shain,* 127 S.W.(2d) 675.

On the other hand it is submitted that the position taken by the Tenth Circuit Court of Appeals herein is sustained by *Paist* v. *Aetna Life Ins. Co.,* 54 Fed.(2d) 393, affirmed by the Third Circuit Court of Appeals in 60 Fed.(2d) 476; and *Dupee* v. *Travelers Ins. Co.* (N.Y.), 16 N.E.(2d) 391. If the Court cares to consider other cases involving similar policy provisions but where death resulted from some cause other than sunstroke, we suggest *Travelers Insurance Company* v.

Ansley, supra; Ansley v. *Travelers Insurance Company, supra; Fidelity Mutual Life Ins. Co.* v. *Powell, supra,* (Fourth Circuit); and *Pope* v. *Lincoln National Life Ins. Co.,* 103 Fed.(2d) 265 (Eighth Circuit).

CONCLUSION

In conclusion, the respondent respectfully submits that this case is not one which requires a review by the Supreme Court of the United States for the reason that it involves purely a non-Federal question of local law where eventually the Federal courts will be in as hopeless a conflict as that which exists between the decisions of the highest courts of the various states. It having been admitted that there is no controlling decision of the Supreme Court of Oklahoma, respondent believes that the Circuit Court of Appeals for the Tenth Circuit was entitled to its independent judgment as to the correct judgment to render.

Respectfully submitted,

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